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No. 46.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

On Petition for Writ of Certiorari from the United States Court of Appeals for the Sixth Circuit.

VIRGIL HERDMAN,
Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,
Respondent.

REPLY BRIEF OF PETITIONER ON THE MERITS.

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STATEMENT OF THE CASE.

Because of several statements in the respondent's brief, which might tend to mislead the court, petitioner feels constrained to submit this reply brief. These statements relate both to law and facts; some are excerpts taken from the testimony of the petitioner but are statements of hearsay brought out by respondent on cross examination and other statements from which the respondent attempts to

draw a completely erroneous conclusion. No one testified but petitioner as to facts.

Can the court possibly conceive of any employee in the caboose of a train having personal knowledge as to why the engineer makes a sudden application of the brakes of the locomotive sixty-eight cars ahead?

Respondent would have this court believe that there was direct testimony by petitioner as to why this sudden stop was made, but an examination of the records shows that petitioner maintained throughout that the statements made were "what those guys told me. I can't see up there. I don't know." (R., 31) and "The engineer told me that." (R., 32) "He told me that." (R., 32).

In its statement of the "Question Presented for Review" and "Statement of the Case", respondent would have the court believe that there is evidence in the record that the train on which petitioner was riding at the time he sustained his injuries was brought to a stop because of an emergency: an automobile crossing respondent's tracks. *Such is not in evidence.* The only evidence is that the engineer of respondent's train *told* petitioner subsequent to the occurrence that this was why he brought the train to such a suddent and disastrous stop.

Respondent refers to petitioner's comments that *he* had to expect a sudden stop but there was nothing *he* could do about it. Respondent would have it appear that petitioner meant there is nothing the engineer could do about it. Of course, *petitioner meant there was nothing he personally could* do about it while in the caboose. At page 37 of the record, petitioner clearly stated his position:

> "I didn't have a way to avoid it. We can think about it but nothing we can do about it. We were just like a man in a ship out there in the middle of the ocean. You may think about it sinking. If it is going to sink, you are going to get wet."

Petitioner's complete dependence upon the engineer and the respondent's failure to provide any means for a warning to petitioner could not be pointed up more tersely.

The respondent also states, "The record lends no support to the allegation that petitioner was suffering pain at the time this report was made." We hasten to point out that even though the testimony of the doctor was not made a part of this record on appeal the petitioner himself stated that on the occasion when he signed the report;

> "I was suffering pretty much. I don't remember what I might have done." (R., 40)

Respondent must concede that petitioner has been unable to work for almost six years and never in his experience was a sudden stop so disastrous.

Respondent omits the fact there existed a continuing duty on the part of its engineer to exercise due care for the safety of the petitioner. Respondent omits the fact that this was an affirmative duty imposed by federal law, one which could not be discarded regardless of the circumstances.

ARGUMENT.

Under Section I of respondent's argument it is stated:

> "Negligence is the sole basis of liability."

That is fundamental. However, respondent goes on to state:

> "The law should not and does not permit the doctrine of res ipsa loquitur to be employed for such a purpose."

Petitioner was injured from an obvious violation of the legal duty owed to him by respondent, to-wit: his place to work was made unsafe by the conduct of the respondent. Res ipsa loquitur is an appropriate and adequate vehicle to carry the petitioner's case to the jury. This court has held that res ipsa loquitur is available in an appropriate action under the Federal Employers' Liability Act. *Jesionowski v. Boston & Maine Railroad,* 329 U. S., 452 (1947); *O'Neill v. The Baltimore & Ohio Railroad Company,* 348 U. S., 956 (1954), reversing 211 F. (2), 190.

Under Section IIA of respondent's argument it is stated:

> "The law cannot and should not justify the proposition that if an emergency stop is made by an engineer operating a railroad train, that engineer and his master are presumed to be negligent in law."

It is just such misleading statements of law which have resulted in this appeal. Petitioner does not argue that the engineer and his master should be *presumed* to be negligent, even under the facts of this case.

Because of the sudden stop of this train within the respondent's yard limits, petitioner submits that an *inference* of respondent's negligence may be drawn. This

principle is clearly supported by *Zumwalt v. Gardner*, 160 F. (2), 298 (8 CCA, 1947) and *Chesapeake & Ohio Ry. Co. v. Smith*, 42 F. (2), 111 (6 CCA, 1930) and other cases cited in petitioner's brief which are not distinguished in respondent's brief.

> "While the words presumption and inference are often confused, nevertheless there is a clear and definite distinction between them." *Fink v. N. Y. C. Rd. Co.*, 144 Ohio State, 1, 6, (1944).

In Section IIB of respondent's argument, respondent would have the court believe that there was direct evidence of why this sudden stop occurred and the "explanation and exculpation is so legally absolute that no possible hypothesis of proximate negligence can reasonably survive it." *Chicago & N. W. Ry. Co. v. Green*, 164 F. (2), 55, 60 (8 CCA, 1947).

Further respondent argues "if hearsay evidence is admitted without objection, it is to be considered and accorded its natural probative effect." That what the engineer told petitioner constituted hearsay and a self-serving statement, respondent would appear to admit; however, we are constrained to point out to the court that petitioner did enter his objection on page 32 of the record:

> "Mr. McNamara: I want to object as to hearsay and what the engineer told this man is not subject matter for cross examination.
>
> Mr. Barton: I think it is entirely proper on cross examination.
>
> * * * * * * * * * *
>
> The Court: I will overrule the objection."

The respondent also relies upon the statement in *Lucid v. DuPont*, 199 F., 377:

> "* * * the doctrine is to be applied only when the nature of the accident itself, not only supports the

inference of defendant's negligence, but excludes all others."

This is not the law as expressed by this court.

In *Johnson v. United States*, 333 U. S., 46 (1947), Mr. Justice Douglas stated the law at page 48:

"No act need be explicable only in terms of negligence in order for the rule of res ipsa loquitur to be invoked."

Such erroneous concepts of the law only serve to make it more imperative that this court reverse the lower courts' decisions in this case and firmly settle the law. It is obvious that unless this is done, res ipsa loquitur will be unduly restricted in the Sixth Circuit.

In Section IIC of respondent's brief it states:

"The knowledge of how the occurrence happened must be peculiarly within the knowledge of the defendant."

Again, this is not the law.

Res ipsa loquitur has frequently been applied when it is apparent from the facts that the accident is a mysterious occurrence as to which the defendant knows no more than the plaintiff. See *Hiell v. The Golco Oil Co.*, 137 Ohio St., 180, 28 N. E. (2), 561 (1940). Res ipsa loquitur has even been applied when the defendant is dead. In *Weller v. Worstall*, 50 Ohio App., 11 (1934), it is stated on page 17:

"As a last contention it is claimed that the doctrine can not be invoked against one who dies as a result of the same accident. It is stated that the real reason for the rule lies in the fact that the cause of injury is usually known by the defendant and unknown to the plaintiff, and that when the reason for the rule fails the rule becomes inoperative. In other words the

management and control of the automobile having been in the decedent, and he being dead, he can not now speak the true cause of the accident. That theory may be one of the reasons for the rule, but it is not the basic cause for its adoption."

As stated on page 302 of *Prosser on Torts*:

"If the circumstances are such as to create a reasonable inference of negligence, it cannot be supposed that the inference ever would be defeated by a showing that the defendant knew nothing about what had happened."

In any event it is clear that the petitioner had no knowledge of why the train was brought to a sudden stop. The only person having such knowledge must have been the person who brought it to such a stop. Whoever that was, respondent should have presented him as a witness.

All evidence as to why defendant's engineer stopped the train was hearsay to the plaintiff and was injected into the trial by defendant on cross examination, who submitted a report that had been prepared by one other than plaintiff and submitted to plaintiff only for signature.

In Section IID of respondent's argument the respondent argues, in effect, that the inference of negligence is overcome by virtue of the fact the automobile which was allegedly crossing or approaching the tracks (but which was not involved in any collision with the train) was not in the control of the defendant.

First it must be assumed that what goes on within the respondent's yard limit is within the control of the respondent.

Further in *Fink v. New York Cen. R. Co.*, 144 Ohio St., 1, 56 N. E. (2), 456 (1944), cited in petitioner's brief, the

Ohio Supreme Court was faced with the identical question. The court in that case held that res ipsa loquitur was applicable when the plaintiff was injured as a result of a collision between the train in which he was riding and an automobile which had been overturned at a crossing. The court held at page 10 of 144 Ohio St.:

> "* * * It should be kept clearly in mind that the train, the derailment of which caused plaintiff's injury, was under the exclusive management and control of the defendants and while it was entirely proper for the defendants to prove in explanation, the circumstances of the derailment, nevertheless, it was still a question of fact for the jury as to whether defendants had rebutted or overcome the inference of negligence arising from the derailment of the train."

SUMMARY.

The respondent has failed to justify any distinction between the cases relied upon by petitioner and the instant case. It is clear that a conflict of authorities exists between the circuits and between the Sixth Circuit and several state courts.

It is also apparent that the judgment in the instant case was based upon an erroneous concept of fact and of the law as regards res ipsa loquitur. If this misconception is allowed to stand unaltered it will result in serious erosion of the doctrine in the Sixth Circuit.

If the instant case is allowed to stand unaltered the ruling of this court in *O'Neill v. The Baltimore & Ohio Railroad Company*, 348 U. S., 956 (1954), will be effectively reversed, for the *O'Neill* case holds that the court cannot substitute itself for the jury in determining issues of fact—in that case, as in this—whether the inference of negligence has been rebutted.

CONCLUSION.

In view of the serious errors committed by the courts below, the judgment should be reversed. Petitioner should be granted a new trial.

Respectfully submitted,

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